

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CODY A. CABO,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 2:14-CV-0378-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment (ECF Nos. 12, 13). The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

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JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Garrison*

1 *v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (“Where the evidence can reasonably
2 support either affirming or reversing a decision, we may not substitute our
3 judgment for that of the ALJ.” (internal quotation marks and brackets omitted)).
4 Further, a district court “may not reverse an ALJ’s decision on account of an error
5 that is harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
6 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1117
7 (internal quotation marks and citation omitted). The party appealing the ALJ’s
8 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
9 *Sanders*, 556 U.S. 396, 409-10 (2009).

10 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

11 A claimant must satisfy two conditions to be considered “disabled” within
12 the meaning of the Social Security Act. First, the claimant must be “unable to
13 engage in any substantial gainful activity by reason of any medically determinable
14 physical or mental impairment which can be expected to result in death or which
15 has lasted or can be expected to last for a continuous period of not less than twelve
16 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
17 “of such severity that he is not only unable to do his previous work[,] but cannot,
18 considering his age, education, and work experience, engage in any other kind of
19 substantial gainful work which exists in the national economy.” 42 U.S.C.
20 § 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.
3 § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
4 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in
5 "substantial gainful activity," the Commissioner must find that the claimant is not
6 disabled. 20 C.F.R. § 416.920(b).

7 If the claimant is not engaged in substantial gainful activities, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
10 "any impairment or combination of impairments which significantly limits [his or
11 her] physical or mental ability to do basic work activities," the analysis proceeds to
12 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
13 this severity threshold, however, the Commissioner must find that the claimant is
14 not disabled. *Id.*

15 At step three, the Commissioner compares the claimant's impairment to
16 several impairments recognized by the Commissioner to be so severe as to
17 preclude a person from engaging in substantial gainful activity. 20 C.F.R.
18 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 416.920(d).

1 If the severity of the claimant's impairment does meet or exceed the severity
2 of the enumerated impairments, the Commissioner must pause to assess the
3 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations (20 C.F.R.
6 § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in
9 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
10 capable of performing past relevant work, the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
12 performing such work, the analysis proceeds to step five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
16 must also consider vocational factors such as the claimant's age, education and
17 work experience. *Id.* If the claimant is capable of adjusting to other work, the
18 Commissioner must find that the claimant is not disabled. 20 C.F.R.
19 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
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1 analysis concludes with a finding that the claimant is disabled and is therefore
2 entitled to benefits. *Id.*

3 The claimant bears the burden of proof at steps one through four above.
4 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
5 the analysis proceeds to step five, the burden shifts to the Commissioner to
6 establish that (1) the claimant is capable of performing other work; and (2) such
7 work “exists in significant numbers in the national economy.” 20 C.F.R.
8 § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 Plaintiff filed an application for supplemental security income on July 6,
11 2011,¹ alleging a disability onset date of January 19, 2011. Tr. 234-40. This
12 application was denied initially and upon reconsideration, and Plaintiff requested a
13 hearing. Tr.150-53, 162-64, 169-71. A hearing was held before an Administrative
14 Law Judge (“ALJ”) on May 1, 2013. Tr. 39-71. The ALJ rendered a decision
15 denying Plaintiff benefits on June 24, 2013. Tr. 18-38.

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17 ¹ Plaintiff also protectively filed an application for child’s insurance benefits on
18 August 23, 2010; however, the ALJ found Plaintiff ineligible for child’s insurance
19 benefits based on his age. Tr. 23. Plaintiff does not challenge this denial of
20 benefits.

1 At step one, the ALJ found that Plaintiff had not engaged in substantial
2 gainful activity since January 19, 2011, the alleged onset date. Tr. 23. At step
3 two, the ALJ found that Plaintiff had the following severe impairments: substance
4 abuse disorder, substance induced psychosis, mood disorder, and antisocial
5 personality disorder. Tr. 24. At step three, the ALJ found that Plaintiff's
6 impairments, including substance use disorder, met sections 12.03, 12.04, 12.08,
7 and 12.09 of 20 C.F.R. 404, Subpart P, Appendix, which would direct a finding of
8 disabled. Tr. 24-26. However, because the ALJ found substance abuse to be a
9 contributing factor material to the determination of disability, the ALJ proceeded
10 to determine whether Plaintiff's physical and mental limitations would remain if he
11 stopped abusing. Tr. 26. During this second look, the ALJ found that if Plaintiff
12 stopped the substance abuse, he would not have an impairment or combination of
13 impairments that meet or medically equal a listed impairment. Tr. 26. The ALJ
14 then determined that if Plaintiff stopped the substance abuse, he would have the
15 RFC

16 to perform a full range of work at all exertional levels but with the
17 following nonexertional limitations: the claimant would be capable of
18 simple routine tasks with minimal to no contact with the general
19 public, and a degree of supervision that would not be hovering, not
20 even dealing with a supervisor on an occasional basis, but a more
independent performance of work duty.

Tr. 27. At step four, the ALJ found that Plaintiff had no past relevant work. Tr. 31. At step five, after considering Plaintiff's age, education, work experience, and RFC, the ALJ found that if Plaintiff stopped the substance abuse, he could perform the representative occupations of dishwasher, laundry worker II, and industrial cleaner. Tr. 31-32. The ALJ concluded that Plaintiff's substance use disorder was a contributing factor material to the determination of disability because the Plaintiff would not be disabled if he stopped the substance abuse. Accordingly, the ALJ concluded that Plaintiff was not disabled under the Social Security Act and denied his claim on that basis. Tr. 32.

The Appeals Council denied Plaintiff's request for review on November 7, 2014, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. Tr. 1-6; 42 U.S.C. §§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him supplemental security income under Title XVI of the Social Security Act.

Plaintiff raises the following three issues for review:

- (1) Whether the ALJ properly conducted a step two analysis;
- (2) Whether the ALJ properly weighed the opinion of testifying medical expert Dr. Layton; and

1 (3) Whether the ALJ presented a complete hypothetical to the vocational
2 expert.

3 ECF No. 12. This Court addresses each issue in turn.

4 DISCUSSION

5 A. Step Two Analysis

6 The step two inquiry is merely a *de minimis* screening device intended to
7 dispose of groundless claims. *Edlund v. Massanari*, 253 F.3d 1152, 1158 (9th Cir.
8 2001). It does not result in a finding of disability if a particular impairment is
9 found to be “severe” within the meaning of the Commissioner’s regulations. *See*
10 *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).

11 An impairment, to be considered severe, must significantly limit an
12 individual’s ability to perform basic work activities. 20 C.F.R. § 416.920(c); SSR
13 96-3P, 1996 WL 374181; *see Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
14 1996). Basic work activities include “abilities and aptitudes necessary to do most
15 jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling,
16 reaching, carrying or handling.” 20 C.F.R. § 416.921(b). An impairment must be
17 established by medical evidence consisting of signs, symptoms, and laboratory
18 findings, and “under no circumstances may the existence of an impairment be
19 established on the basis of symptoms alone.” *Ukolov v. Barnhart*, 420 F.3d 1002,
20 1005 (9th Cir. 2005) (citing SSR 96-4p, 1996 WL 374187 (July 2, 1996)) (defining

1 “symptoms” as an “individual’s own perception or description of the impact of”
2 the impairment). Plaintiff bears the burden of proving that his medically
3 determinable impairment or its symptoms affect his ability to perform basic work
4 activities. *Edlund*, 253 F.3d at 1159-60.

5 Plaintiff contends the ALJ erred in her step two analysis when she failed to
6 find Plaintiff’s alleged learning disabilities, Irlen Syndrome, and antisocial
7 personality disorder to be severe. ECF No.12 at 12-14. In turn, Plaintiff asserts
8 that this failure to classify these limitations as severe at step two resulted in an
9 inaccurate RFC. *Id.* at 14.

10 This Court finds the ALJ’s severe impairment analysis at step two was not
11 flawed. At step two, the ALJ found Plaintiff suffered from the following severe
12 impairments: substance abuse disorder, substance induced psychosis, mood
13 disorder, and antisocial personality disorder. Tr. 24. Thus, Plaintiff’s claim
14 proceeded past the initial *de minimis* screening at step two. Even if the ALJ had
15 found Plaintiff’s Irlen Syndrome and learning disabilities to also be severe
16 impairments, such a conclusion would not have resulted in a finding of disability at
17 step two.

18 In any event, there was no error in the ALJ’s analysis. Regarding Plaintiff’s
19 alleged Irlen Syndrome, Plaintiff’s diagnosis came from Plaintiff’s school records.
20 Tr. 355-56, 379. Thus, without medical acceptable evidence to corroborate

1 Plaintiff's alleged condition, the ALJ properly concluded that Plaintiff did not meet
2 his burden to show a severe impairment. Tr. 24; *see Ukolov*, 420 F.3d at 1005.

3 Regarding Plaintiff's learning disabilities, the ALJ noted that this
4 impairment was diagnosed by E. Clay Jorgensen, Ph.D. and that school records
5 demonstrated Plaintiff had received special education services; however, the record
6 evidence did not establish a medically determinable impairment. Tr. 24. For
7 instance, Jay Toews, Ed.D., although he similarly found claimant's intelligence in
8 the "extremely low range," opined that a true picture of Plaintiff's cognitive
9 functioning could not be obtained unless the Plaintiff had been clean and sober for
10 at least twelve months. Tr. 493 (noting that Plaintiff appeared to be slightly
11 intoxicated at the evaluation). Additionally, medical expert Kent Layton, Psy.D.,
12 testified that such standardized intelligence testing is unreliable in cases such as
13 Plaintiff's where schooling was limited. Tr. 48. Finally, even considering Dr.
14 Jorgensen's examination in isolation—which examination was conducted for
15 purposes of determining competency issues in legal proceedings—the report does
16 not state that Plaintiff's learning disability would significantly limit his physical
17 ability to do basic work activities. *See* 20 C.F.R. § 416.920(c). Accordingly, the
18 ALJ did not err in declining to designate Plaintiff's learning disabilities as a severe
19 impairment.

1 Although Plaintiff asserts that the ALJ's step two analysis resulted in an
2 improper RFC, this Court disagrees. While it is true the ALJ did not classify
3 Plaintiff's learning disabilities or Irlen Syndrome as severe, the ALJ considered
4 evidence regarding Plaintiff's cognitive limitations and ultimately found Plaintiff
5 should be limited to "simple routine tasks." Tr. 27. The evidence does not support
6 a greater effect on Plaintiff's ability to work. Indeed, the only limitation Plaintiff
7 identifies—that he is capable of only simple, routine tasks as opined by Dr.
8 Layton, ECF No. 12 at 13—is precisely the limitation ultimately included in the
9 RFC. Thus, any error in the ALJ's analysis was harmless. *Molina*, 674 F.3d at
10 1115.

11 **B. Medical Opinion Evidence**

12 There are three types of physicians: "(1) those who treat the claimant
13 (treating physicians); (2) those who examine but do not treat the claimant
14 (examining physicians); and (3) those who neither examine nor treat the claimant
15 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."
16 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
17 A treating physician's opinions are generally entitled to substantial weight in social
18 security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
19 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted,
20 an ALJ may reject it only by offering "clear and convincing reasons" that are

1 supported by substantial evidence in the record. *Ryan v. Comm’r of Soc. Sec.*
2 *Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008); *Bayliss v. Barnhart*, 427 F.3d 1211,
3 1216 (9th Cir. 2005). Conversely, if a treating or examining doctor’s opinion is
4 contradicted by another doctor’s opinion, an ALJ may only reject it by providing
5 “specific and legitimate reasons” that are supported by substantial evidence in the
6 record. *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir.
7 2009); *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d at 830-31 9th
8 Cir. 1995)). A non-examining physician, on the other hand, is not entitled to such
9 weight: “The Commissioner may reject the opinion of a non-examining physician
10 by reference to specific evidence in the medical record.” *Sousa v. Callahan*, 143
11 F.3d 1240, 1244 (9th Cir. 1998).

12 “Where an ALJ does not explicitly reject a medical opinion or set forth
13 specific, legitimate reasons for crediting one medical opinion over another, he
14 errs.” *Garrison*, 759 F.3d at 1012. “In other words, an ALJ errs when he rejects a
15 medical opinion or assigns it little weight while doing nothing more than ignoring
16 it, asserting without explanation that another medical opinion is more persuasive,
17 or criticizing it with boilerplate language that fails to offer a substantive basis for
18 his conclusion.” *Id.* at 1012-13. That being said, the ALJ is not required to recite
19 any magic words to properly reject a medical opinion. *Magallanes v. Bowen*, 881
20 F.2d 747, 755 (9th Cir. 1989) (holding that the Court may draw reasonable

1 inferences when appropriate). “An ALJ can satisfy the ‘substantial evidence’
2 requirement by ‘setting out a detailed and thorough summary of the facts and
3 conflicting clinical evidence, stating his interpretation thereof, and making
4 findings.’” *Garrison*, 759 F.3d at 1012 (quoting *Reddick v. Chater*, 157 F.3d 715,
5 725 (9th Cir. 1998)).

6 Plaintiff contends the ALJ did not properly reject the opinion of Dr. Layton,
7 the testifying medical expert. ECF No. 12 at 14. Specifically, Plaintiff faults the
8 ALJ for not providing any convincing rationale for ignoring Dr. Layton’s opinion
9 that Plaintiff would have attention or absenteeism issues that would make a normal
10 workday or week difficult. *Id.*

11 The ALJ gave “substantial weight” to the opinion of Dr. Layton that
12 Plaintiff, in the absence of substance abuse, would be capable of simple repetitive
13 tasks with minimal contact with others. Tr. 29. The ALJ found this opinion
14 consistent with other medical and opinion evidence in the record, as well as
15 Plaintiff’s own statements regarding his daily activities. Tr. 29. With regards to
16 Plaintiff’s difficulty completely attending a regular workday or work week due to
17 attention issues or absenteeism, the ALJ rejected this opinion as unsupported by
18 the evidence as a whole and evidence regarding Plaintiff’s functioning in
19 particular. Tr. 30.

1 This Court finds that the ALJ properly evaluated the opinion of Dr. Layton.
2 As a non-examining physician, Dr. Layton's opinions could be rejected by
3 reference to specific evidence in the record. *See Sousa*, 143 F.3d at 1244. Plaintiff
4 faults the ALJ for ignoring, without comment, Dr. Layton's opinion regarding
5 Plaintiff's ability to attend a normal workday or workweek. The ALJ discussed
6 this opinion, but incorrectly attributed it to Plaintiff's representative. *See* Tr. 30.
7 Nonetheless, the ALJ properly rejected this opinion by citing to the record as a
8 whole and specifically referenced evidence of claimant's functioning independent
9 of substance abuse. Tr. 30. For instance, as discussed by the ALJ earlier in the
10 opinion, Plaintiff's mental impairments appeared to improve when he stopped
11 using. Tr. 28 (citing Tr. 526, 570); Tr. 29 (citing Tr. 906). The ALJ is neither
12 required to recite the magic words, "I reject Dr. Layton's opinion because . . . ,"
13 nor is this Court deprived of making reasonable and legitimate inferences when
14 reviewing the ALJ's findings. *See Magallanes*, 881 F.2d at 755. Moreover, it is
15 worth noting that directly after Dr. Layton stated that Plaintiff would have
16 difficulty five to fifteen percent of the time attending a normal workday or
17 workweek without interference, he went on to opine that Plaintiff would be capable
18 of simple and repetitive tasks, which opinion the ALJ gave substantial weight. Tr.
19 29; *see* Tr. 59-60. Accordingly, because the ALJ rejected Dr. Layton's opinion
20 with reference to specific evidence in the record, this Court does not find error.

1 **C. Hypothetical Question Posed to Vocational Expert**

2 “Hypothetical questions posed to the vocational expert must set out *all* the
3 limitations and restrictions of the particular claimant” *Embrey v. Bowen*, 849
4 F.2d 418, 422 (9th Cir. 1988). “Unless the record indicates that the ALJ had
5 specific and legitimate reasons for disbelieving a claimant's testimony as to
6 subjective limitations such as pain, those limitations must be included in the
7 hypothetical in order for the vocational expert's testimony to have any evidentiary
8 value.” *Id.* at 423. “If the assumptions in the hypothetical are not supported by the
9 record, the opinion of the vocational expert that claimant has a residual working
10 capacity has no evidentiary value.” *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th
11 Cir. 1984).

12 Plaintiff contends the hypothetical question posed to the vocational expert
13 did not adequately express the full extent of his limitations. ECF No. 12 at 15.
14 Plaintiff does not point to any specific limitation that was missing from the
15 hypothetical. *See id.*

16 To the extent Plaintiff is asserting that his Irlen Syndrome, learning disorder,
17 and absenteeism should have been included in the hypothetical, this argument is
18 derivative of Plaintiff's arguments discussed in detail above. As previously noted
19 by this Court, the ALJ properly excluded Plaintiff's claimed Irlen Syndrom and
20 learning disorder from his medically determinable impairments and reasonable

1 rejected Dr. Layton's unsupported opinion regarding Plaintiff's expected
2 attendance issues. Thus, because the ALJ included the full extent of credible
3 limitations supported by the record in the hypothetical, this Court does not find
4 error.

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (ECF No. 12) is **DENIED**.

7 2. Defendant's Motion for Summary Judgment (ECF No. 13) is

8 **GRANTED.**

9 The District Court Executive is directed to file this Order, enter
10 **JUDGMENT** for Defendant, provide copies to counsel, and **CLOSE** the file.

11 **DATED** September 10, 2015.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge